United States Department of Labor
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, D.C. 20001

Date: February 2, 1998

CASE NO.: **95 INA 180**

In the Matter of:

EDITH AND DAVID STARBUCK,
Employer,

on behalf of

PENA ABEL NOQUEZ,
Alien

Appearance: S. M. Jeannette, Agent, of Del Mar, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that EDITH AND DAVID STARBUCK (Employer), filed on behalf of PENA ABEL NOQUEZ (Alien), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On August 30, 1993, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Arabian Horse ranch caretaker." AF 43. The job duties were described as follows:

> Principal responsibilities are the care of 12-17 Arabian horses, which entails a number of activities: feeding, arranging for vet care, shoeing and hoof care; maintaining the inventory of hay and grain, vitamins and, when indicated, assisting the veteninarian in the event. Obtaining additional help when necessary at certain times of the year. Assistance in foaling and mating. Responsible for the overall functions of the farm, including landscape maintenance, pest control, tree trimming and general maintenance of the facilities.[2]

On the basis of the Employer's description, the job offered was classified as "Barn Boss" under DOT Occupational Code No. 410.131.010.[3] The wage offered was $8.81 per hour from 6:30 AM to 3:30 PM, for a forty hour week. The education required was six years of grade school, and the experience was two years in the Job Offered or two Years of working at a horse ranch. The Other Special Requirements were that the applicant:

> Must speak English and Spanish. English to handle the ranch, and Spanish for the extra workers that must be hired.

Id. Although four U. S. workers applied for the job, none were hired.

Notice of Findings. The CO's September 8, 1994, Notice of Findings (NOF) found that the job opportunity involved a combination of the duties of a caretaker of Arabian horses and landscape maintenance, grounds, and facilities. AF 37. The CO said that Employer's job description , it violated 20 CFR § 656.21(b)(2) (ii) because it required the worker to perform duties that do not appear in any single DOT job description, citing **H. Stern Jewelers, Inc.**, 88

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[2]This is the text as altered after it was filed. Quotation of amended text is verbatim without correction of spelling or grammar.

[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

INA 421 (May 23, 1990).[4] As the Employer did not provide evidence that it normally had employed workers to perform this combination of duties or that workers in the area of intended employment customarily performed this combination of duties, or that this combination of duties arose from business necessity, the Employer was directed to remedy this defect by (1) a revision of its job description to eliminate the combination of duties and to retest the employment market, (2) to present evidence that it normally and customarily employed workers to perform this combination of duties, or (3) to justify its combination of these job duties on the basis of business necessity.

As a further issue, the CO found Employer's specification facility in a foreign language to be a restrictive requirement that violated 20 CFR 656.21(b)(2)(i)(c), and directed Employer to remedy the defect by deleting it or by proving either that the foreign language skill was normal and customary for the performance of this work or that it was required by business necessity.

Rebuttal. On September 13, 1994, Employer filed a Rebuttal to the NOF, in which it argued that its combination of duties was a business necessity "because we are a small operation and cannot afford to bring in additional workers and add them to our payroll." The Employer also said that it had employed workers in the position from January 1986 to the time of application, namely Raul Munoz and Pablo Noguez. Addressing the business necessity of the foreign language, the Employer said the labor pool for its ranch is primarily Hispanic, that neither member of the couple speaks Spanish, and that this employee's fluency as a supervisor is essential to their operation of the business. AF 17-18.

The Employer did not offer to revise either restrictive requirement, but argued that it had employed those two workers to perform the combined duties in the past, and contended that the available occasional labor pool required a Spanish speaking supervisor. The evidence of the Employer's customary practice in regard to job duties was the unsupported statement in rebuttal, and the names of the men it had employed. The Employer also said it was not economically feasible to have more than one employee to do all of the listed duties. No data or other documentation was offered to support either of these restrictive requirements.

Final Determination. After considering Employer's rebuttal documentation with the remainder of the record, the CO denied certification by the Final Determination of December 8, 1994. Notwithstanding the detailed directions set out in the NOF, the Employer's rebuttal did not submit the documentary proof that the CO identified, nor did Employer indicate that it failed

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[4] **410.131-010 BARN BOSS** (any industry) alternate titles: corral boss; hostler; lot boss; stable manager. Supervises and coordinates activities of workers engaged in maintenance of stables and care of horses: Establishes amount and type of rations to feed animals according to past food consumption, health, activity, and size of animals. Inspects animals for evidence of disease or injury and treats animal according to experience or following instructions of VETERINARIAN (medical ser.). Inspects stables and animals for cleanliness. Supervises STABLE ATTENDANT (any industry) in upkeep of stalls, feed and water troughs, and equipment, and in care and feeding of animals. Performs other duties as described under SUPERVISOR (any industry) Master Title. GOE: 03.02.04 STRENGTH: L GED: R4 M3 L3 SVP: 7 DLU: 77.

to grasp the nature or content of the documentation and other proof that the CO directed it to file in the NOF instructions. Moreover, the Employer did not at any point offer to alter and reduce the job requirements that the CO found unlawfully restrictive under the Act and regulations to the normal level of qualifications for this position.

The CO's rejection was based on (1) Employer's failure to explain why alternatives were not acceptable and (2) its failure to provide the requisite documentation to establish the facts on which its arguments relied.[5] As a result, the CO said, Employer did not establish either that its combination of duties is customary or that such duties rest on its business necessity. AF 16.

Appeal. While the Employer's December 14, 1994, appeal was captioned "Motion to Reconsider Denial of Certification," its text did not in any way request reconsideration or raise any issue that could not have been addressed in the rebuttal nor did it state any reason that would justify reconsideration in any way whatsoever.[6] Employer's appeal restated its rebuttal arguments and again said it was not financially feasible to hire additional workers to perform the combined duties it said it customarily assigned to an employee in this job. The Employer then complained that the CO had failed to make an independent investigation of the contention that its customary labor pool is Spanish speaking, arguing that the CO has the duty to call the various other employers it named who, the Employer said, would verify its contentions as to the business necessity of Spanish language fluency.

Discussion

The issue is whether the CO correctly found the Employer's description of the position offered to require a combination of duties and/or a foreign language requirement that was prohibited as restrictive within the meaning of the Act and regulations. Under 20 CFR §§ 656.21(b)(2)(i)(c) and 656.21(b)(2)(ii) a request for certification must be denied unless the Employer can prove that both its combined duties and its foreign language requirement are either customary or business necessities.

The CO explained in the NOF that Employer's proof must establish the infeasibility of such reasonable alternatives as part time workers, new equipment, or business reorganization to accomplish the combined duties. **Robert L. Lippert Theatres**, 88 INA 433 (May 30, 1990)(*en banc*); **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*). Also, the CO cited **Wang Westland**

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[5]The CO discussed Employer's allegations concerning a parallel case. The CO observed that the cited case concerned a "Supervisor, Stock Ranch," explaining that the job at issue is clearly different. The CO said the cited case supported the inference that the Proposed Job duties were a proscribed combination, since the Stock Ranch Supervisor's duties were encompassed by the DOT occupational description, while the work Employer assigned to a Barn Boss clearly exceeded the DOT specifications. The CO said this combination of duties was sufficient reason to reject labor certification without considering any other issue.

[6]Accordingly, as there was no reason to construe this document as anything other than a timely appeal, we will address the issues referred by the CO.

Industrial Corp., 88 INA 027 (Mar. 3, 1989)(*en banc*), to alert Employer to the need to document its allegations that it could not afford to hire two workers for the combined duties it set out in the job description. Finally, the CO cited the holding in **Information Industries, Inc.**, 88 INA 082(Jan. 13, 1988)(*en banc*), to show the Employer the criteria to follow in proving the business necessity of its foreign language requirement.

It is appropriate to explain to the Employer that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361)[7] to implement the burden of proof that Congress placed on certification applicants:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."

As the Employer seeks certification for the Alien pursuant to an exception to the Act's broad limits on immigration into the United States, the award of alien labor certification is strictly construed under the well-established principle that,

> Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.

73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). For these reasons, in applying for certification, the Employer and not the CO must carry the burden of proving all of the issues arising under its application for relief.

In this case the CO found that the position presented in Employer's application incorporated a combination of duties that appeared restrictive on its face. The Employer was required to show (1) that it was customary and normal for horse breeders to hire workers to perform the combination of duties it described, or that the combination of duties was a business necessity, and (2) that the language requirement either was customary and normal or was a

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[7]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

business necessity.[8]

Summary. As discussed above, in the NOF the CO provided sufficient notice of the reasons for the denial of certification, and told the Employer how to cure the defects found in the application. Employer offered to rebut the CO's findings by a narrative statement that was not supported by the documentation specified in the NOF as to either of the restrictive requirements. In spite of the detailed directions set out in the NOF, Employer's rebuttal neither submitted the documentary proof that the CO requested nor indicated that the Employer grasped the nature or content of the documentation and other proof that the CO directed it to file in the NOF. Moreover, the Employer did not at any point offer to alter or reduce to the normal qualifications level its job requirements for this position that the CO identified as unlawfully restrictive under the Act and regulations.

As the evidence of record relating to these issues is sufficient to support the CO's denial of labor certification under the Act and regulations, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[8] As the Employer has offered to rebut the valid findings of the CO with nothing more than unsupported assertions, it is observed that an employer's unsupported assertion that a job requirement is normal for the industry is insufficient to prove its business necessity. **Watkins-Johnson Company,** 93 INA 544 (April 10, 1993). Moreover, the Employer failed to provide any evidence to substantiate its claims that the duties it specified were usually required to perform the job, or that the combination of duties and the foreign language requirement it sought to fill by certification of this alien was customary and normal among horse breeders generally.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.